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No. 80-2052

In the Supreme Court of the United States

OCTOBER TERM, 1980

LOCAL 9, INTERNATIONAL CHEMICAL WORKERS UNION, AFL-CIO, PETITIONER

v.

ARTHUR EISENBERG, ETC.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

MEMORANDUM FOR THE RESPONDENT IN OPPOSITION

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1. On April 18, 1980, Ciba-Geigy Corporation filed a charge with the National Labor Relations Board, alleging that petitioner was engaging in a secondary boycott in violation of Section 8(b)(4)(B) (29 U.S.C. 158(b)(4)(B)) of the National Labor Relations Act (A. 14).[1] Respondent, an NLRB Regional Director,

[1] "A." refers to the appendix, and "S.A." to the supplemental appendix, filed as part of the briefs in the court below.

determined that a complaint should issue on the charges and, pursuant to Section 10(*l*) (29 U.S.C. 160(*l*) of the Act, petitioned the United States District Court for the District of New Jersey for an injunction against petitioner's activity (A. 10-13).[2] After a hearing held on May 5 and 8, 1980, the court found reasonable cause to believe petitioner had violated Section 8(b)(4)(B) of the Act, and it enjoined petitioner, *inter alia*, from picketing at or in the vicinity of the contractors' entrance "pending the final disposition of the matters involved pending before the National Labor Relations Board" (Pet. App. 4a). Petitioner filed a notice of appeal from the district court's order on July 7, 1980. The appeal was confined to the issue of the court's refusal to fashion its order so as "to permit [petitioner] inspections or discovery of the type of work being performed by contractors using the alleged construction gate" (A. 55).[3]

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[2] In particular, the complaint alleged that petitioner had violated the Act by maintaining pickets at the "Contractors' Entrance" on the premises of Ciba-Geigy, a reserved gate that was used exclusively by contractors and suppliers neutral to the primary dispute between petitioner and Ciba-Geigy. See *Local 761, Int'l Union of Electrical, Radio & Machine Workers* v. *NLRB*, 366 U.S. 667, 681 (1961).

[3] At the Section 10(*l*) hearing, petitioner informally requested that the judge modify the proposed injunction to permit petitioner to enter the Ciba-Geigy premises to monitor the neutrality of the contractors' entrance (S.A. 9-11). The judge refused petitioner's request after receiving assurances from counsel for the Regional Director that the Board would continue to furnish petitioner with the names of all contractors using the reserved entrance (S.A. 14-17, 21-22). Petitioner made no formal motions for discovery until June 30 and July 7, 1980 (A. 46-54). The district court took no action with respect to these motions.

In the meantime, on May 22, 1980, petitioner and Ciba-Geigy entered into a settlement agreement in which petitioner agreed not to picket at or in the vicinity of the contractors' entrance and to post for a 60-day period an official notice stating its intention to abide by the terms of the agreement (A. 44-45). The agreement was approved by the Acting Regional Director. On August 6, 1980, following expiration of the 60-day notice posting period, the Acting Regional Director informed petitioner and Ciba-Geigy that the unfair labor practice proceedings were closed (S.A. 1-2).

On February 23, 1981, the court of appeals dismissed petitioner's appeal as moot (Pet. App. 1a-2a). The present petition seeks review of that dismissal and of the alleged refusal of the district court to permit discovery.

2. An injunction proceeding under Section 10(*l*) of the Act is ancillary to the underlying unfair labor practice case, and any injunction issued thereunder expires upon final Board action. *Sears, Roebuck & Co.* v. *Carpet, Linoleum, Soft Tile & Resilient Floor Covering Layers, Local Union No. 419*, 397 U.S. 655 (1970). The withdrawal by the Regional Director, on behalf of the General Counsel of the Board, of an unfair labor practice complaint as part of an informal settlement agreement constitutes final Board action. See, *e.g.*, *I.L.G.W.U., Local 415-475* v. *NLRB*, 501 F.2d 823, 830-831 (D.C. Cir. 1974). When the Acting Regional Director withdrew the complaint in this case on August 6, 1980, the injunction that had been issued "pending the final disposition * * * before the National Labor Relations Board" (Pet. App. 4a) expired both by its own terms and by operation of law.

Contrary to petitioner's contention (Pet. 12-13), this case does not present an issue that is " 'capable of repetition, yet evading review.' " *Super Tire Engineering Co.* v. *McCorkle*, 416 U.S. 115, 122 (1974). The question presented for review is whether petitioners may properly be enjoined from picketing at a gate allegedly reserved for neutral contractors without being afforded an opportunity to determine, through either entry on the premises or discovery, that the gate was not in fact being used by the primary employer or his suppliers. However, petitioner voluntarily entered into an informal settlement agreement that provided for the Acting Regional Director to dismiss the complaint and to close the proceedings upon petitioner's compliance. If petitioner had made timely requests for discovery in the district court (see note 3, *supra*) and had pursued rather than settled the case, the dispute would not have been "in its duration too short to be fully litigated prior to its cessation or expiration." *Weinstein* v. *Bradford*, 423 U.S. 147, 149 (1975).[4] Moreover, it is entirely speculative whether petitioner will have occasion to engage in picketing under similar circumstances in the future, and there is no "demonstrated probability" or "reasonable expectation that the same complaining party would be subjected to the same action again" (*ibid.*).

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[4] Contrary to petitioner's assertion (Pet. 11, 12), the injunction did not terminate in 60 days, but remained in force pending final disposition of the case. Nor would a voluntary cessation of the strike necessarily have rendered this case moot, as contended by petitioner (Pet. 12). *Cf. United States* v. *W.T. Grant Co.*, 345 U.S. 629, 632 (1953); *Solien* v. *Miscellaneous Drivers & Helpers Union, Local 610*, 440 F.2d 124, 127 (8th Cir.), cert. denied, 403 U.S. 905 (1971).

3. With regard to the issue of discovery in district court injunction proceedings (Pet. 13-16), it is clear that discovery under the Federal Rules of Civil Procedures is available to all parties in Section 10(*l*) actions.[5] See, *e.g.*, *Samoff* v. *Williamsport Building & Construction Trades Council*, 313 F. Supp. 1105 (M.D. Pa. 1970), aff'd, 451 F.2d 272 (3d Cir. 1971). Since petitioner made no formal discovery motions until after the Section 10(*l*) hearing had been completed, and since the case was ultimately settled, the district court had no occasion to rule on petitioner's motions for discovery.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

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[5] It is immaterial here whether discovery is available in proceedings before the Board. The petition seeks review not of any Board proceeding but of the proceeding in the district court.

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